

Al Hassan (Migration) [2018] AATA 3480 (30 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Bandar Al Hassan
CASE NUMBER:	1718025
DIBP REFERENCE(S):	BCC2016/1173939
MEMBER:	Helen Kroger
DATE:	30 August 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 30 August 2018 at 3:28pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – Genuine and continuing relationship – Sponsorship withdrawal revoked – Parties reconciled – Applicant working overseas – Social aspects – Photographic evidence provided – Applicant visits wife and children in Australia – Second hearing conducted – Applicant sought unpaid leave to attend hearing – Deep level of commitment – Credible witness – Decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A Schedule 2 cls 820.211, 820.221

CASES

Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 61

Minister for Immigration and Border Protection v Angkawijaya [2016] FCAFC 5

Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham [2000] 168 ALR 407

Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal) [1994] FCA 1105

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 August 2017 to refuse to grant the visa applicant a Partner (Temporary) (Class UK) Subclass 820 visa under s.65 of the *Migration Act 1958* (the Act).
2. The review applicant (applicant) applied for the visa on 17 March 2016. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) of Schedule 2 to the Migration Regulations 1994 (Regulations). The criteria for the grant of the visa are set out in Part 820 of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least one applicant.
3. The applicant appeared before the Tribunal on the 7 June 2018, via telephone, to give evidence and present arguments and attended a second hearing in person in Melbourne on 30 August 2018. The sponsor (wife) attended both hearings in person and gave evidence. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended both Tribunal hearings.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. BACKGROUND

7. The review applicant is of Saudi Arabian descent and arrived in Australia on a student visa. He travelled to Australia with the support of a scholarship that covered his tuition and accommodation. He studied a Bachelor of Engineering, majoring in electrical engineering and computer systems. He met his sponsor (wife) when studying at the Victorian State Library which he did each weekend in 2013. The sponsor was studying for a Bachelor of Arts with a major in language, and has subsequently worked part time as an Arabic Interpreter.
8. The parties commenced a relationship and moved in together in Hawthorn in the same year and married in a civil ceremony on the 2nd March 2014. Two months prior to the civil ceremony, they held a religious Islamic service at the Preston Mosque. The sponsor's family attended the civil ceremony along with friends of both parties. The sponsor has only met the applicant's family via teleconferencing.
9. The parties have two biological children, a three and a half year old daughter and a seventeen month year old son who were born at the Royal Melbourne Hospital.
10. After completing his degree, the applicant had no work rights with his visa and was financially supported by his parents. This situation imposed financial stress on the parties, particularly after the birth of their son, which emotionally affected the sponsor. Eight weeks after his birth, the sponsor advised the Department she was withdrawing her sponsorship, after a heated argument. This was formally withdrawn only after the Department issued the applicant with an invitation to comment on an adverse information letter. The parties claim to have lived continuously together since 2013.

11. The applicant has been working in Riyadh, Saudi Arabia for the last nine months as he secured an employment contract, that expires in January 2019. He supports the family with this income. He returned to Australia, having been granted unpaid leave, to attend the hearing.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the review applicant and primary visa applicant are in a spousal relationship as defined by s.5F of the Act.
13. Based on the information before the Tribunal, it is satisfied that the review applicant is at the time of the decision, an Australian citizen.
14. The applicant has provided a certified and signed copy of the Marriage Certificate that took place in a restaurant at the World Trade Centre, Melbourne, Victoria on the 2 March 2014. There is no evidence before the Tribunal to indicate that the Certificate of Marriage is not genuine, and accordingly the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Whether the parties are in a spouse or de facto relationship

15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the review's and visa applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this section.
16. The Tribunal has given careful consideration to the documentation provided to the Tribunal, evidence provided to the delegate along with oral evidence submitted during the hearing. In assessing the evidence, the Tribunal has given consideration to the fact that the review and visa applicants reside in separate countries and some of the evidence reflects this.

17. Other matters

18. It is appropriate to observe at the outset that compliance with the prescribed criteria turns on the Tribunal's satisfaction as to whether or not the criteria have been met and not on the objective existence of that fact (*Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5 at 15).
19. In determining whether it is so satisfied, the Tribunal is not required to uncritically accept any or all of the allegations made by the applicant or sponsor and it has not done so. As HJ observed in *Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal)* [1994] FCA 1105 at [7]:
 20. A decision-maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out.
21. Similarly, as observed in *Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham* [2000] 168 ALR 407 at [67]:

22. If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.

23. The Tribunal adopts the finding of the Full Federal Court in *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61, in observing that a decision-maker is not required to make the applicant's case. It is for the applicant to satisfy the Tribunal that the requirements of the Act and Regulations have been met. Although the concept of onus of proof is not appropriate to administrative decision-making, the relevant facts of the individual case have to be supplied by the applicant, in as much detail as is necessary to enable the examiner to establish the relevant facts. The Full Federal Court held, at [76]:

24. In an inquisitorial process, it was for the respondent to put whatever evidence or argument he wished to the decision-maker to enable her to reach the requisite state of satisfaction.

25. The Financial Aspects of the Relationship

26. The Tribunal must consider all the financial aspects of the relationship including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources (especially in relation to major financial commitments); whether either person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day to day household expenses.
27. The applicant is currently working in Riyadh, Saudi Arabia as an engineer, with a valid contract that expires in January 2019. The sponsor works two days per week as an Arabic Interpreter and the parties claim to pool their incomes to pay all bills and accounts.
28. The applicant has secured employment in Riyadh for the last year as he was unable to secure employment in Australia, given his temporary status. His income is the equivalent of AUS\$3000 per month, after currency conversion. This salary is paid into a Saudi Arabian bank, and the sponsor holds a credit card attached to the same card, so that she can pay all household, family and personal expenses in Australia. He indicated that approximately 90% of his income is provided to his sponsor for expenses and he spends around 10 percent for accommodation and food. The sponsor supplements this household income with part time work at Northern Health in Victoria. The applicant also holds a Commonwealth Bank account in his name (folio 24). Consideration of the transaction details indicates that it used for various household, car and children related purchases along with items for personal effects.
29. During the hearing, the parties provided consistent and credible evidence regarding the way in which they have pooled their finances to cover the rent on their Preston unit and their household and miscellaneous expenses. Prior to the parties working and post studies, the applicant's father supported them financially, when they had their first child. The applicant has paid for all rental accommodation since they moved in together in 2013.
30. The Tribunal has considered all the material provided, and notes whilst the parties do not share any substantial assets or debts, it is satisfied that the applicant and sponsor share all matters in relation to the financial aspects of their relationship. The Tribunal gives significant weight to the shared nature of the financial aspects of the relationship.

31. The nature of the household

32. In assessing the nature of the household, the Tribunal gives weight to evidence of joint responsibility or shared responsibility for housework and chores, for the care and support of any children (where relevant), and the living arrangements of the parties.

33. Oral evidence provided during the hearing indicates that the parties have lived together since 2013. The Tribunal notes that the parties have been living in separate countries for the last nine months whilst the applicant works off shore to earn an income. Documentation and oral evidence provided indicates that the applicant has travelled back to Australia three times in 2018. As they are living in different countries, the Tribunal recognises that there is limited shared responsibility for the household on a daily basis. The applicant's spontaneous manner in caring or organising the children during the hearing was apparent, as was the children's natural responsive manner, behaviour that is difficult to contrive. The sponsor is the primary carer for the children as they are living with her in Australia.
34. The Tribunal has given regard to the current living arrangements of the parties, that they are living apart till January, other than the applicant's return visits, and do not currently share responsibility for the house.
35. Given the parties are currently living separately for employment reasons, the Tribunal accords no weight to the nature of the household.

36. The social aspects of the relationship

37. In assessing the social aspects of a relationship, the Tribunal must have regard to all the social circumstances of the relationship including whether the parties represent themselves as a couple to other people as being married to each other; the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
38. The applicant provided documentation to the Tribunal that was not available to the delegate for consideration. Photos of the parties, some with their children, have been taken at different time periods and in different circumstances (folio 137-152, 284-313). Other than immediate family, the applicant does not have any family in Australia. He speaks with his brother regularly and discussed with him his relationship with the sponsor, when they first dated and then moved in together. His family live in Riyadh where he is working, and the parties discussed their plans to introduce his wife and children to them towards the end of the year. They have communicated with her via teleconferencing. Her fluency in the Arabic language has facilitated this.
39. At the marriage/civil service, approximately 35 guests were in attendance, including the parents, siblings and other relatives of the sponsor, along with friends of both parties. The Tribunal has regard to the living circumstances of the parties and the direct impact this has on engaging in social activities on a regular basis. The Tribunal has also regard of the practical demands of two children under three and a half and the impact of limited time with them when the applicant has returned for brief periods in 2018, and the way in which the parties have utilised that limited time together.
40. The Tribunal has given careful regard to the social aspects of the relationship, the effect of living apart, the importance of the sponsor's family to them, and the consultation with family members when making significant decisions. Accordingly the Tribunal gives some weight to the social aspects of the relationship.

41. The nature of the person's commitment to each other

42. In assessing commitment to each other, the Tribunal must have regard to the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the parties draw from each other and whether the persons see the relationship as a long term one.

43. The Tribunal convened a second hearing to provide the applicant the opportunity to attend in person, so that the nature of the relationship could be given appropriate consideration. The Tribunal has regard to the responsiveness of the applicant to take unpaid leave from his employer in Riyadh so that he could attend the hearing in person and the open and candid way in which he sought to understand and respond to questions, noting that English is not his first language.
44. Whilst the parties have been together since 2013, he spoke of his brother's advice to take his time to get to know the sponsor. The oral evidence (recorded in the audio) indicates that the parties have discussed Islam, the importance of the Muslim faith to the applicant, its relevance or otherwise to the sponsor, and plans for their children in the way in which they will be raised. The responses indicated a considered approach to the question of religion and respect for the independence, views and thinking of the sponsor.
45. The parties are the biological parents of two children and their birth certificates were provided to the Tribunal for consideration (folio 115,116). There is no evidence to suggest that they are not the parties' biological children. The Tribunal believes it is not only in the interests of children but also the wider Australian community and good, to keep families together.
46. Whilst the sponsor advised that she had withdrawn her support for the application in 2015, which she later advised was a mistake, the Tribunal has carefully considered all the circumstances around that time, the recent birth of her first child, emotional and physical complications post child birth and the financial hardships they were experiencing at that time. The evidence provided by both parties when discussing this time in their relationship was particularly candid and the Tribunal gives much weight to the credibility of submissions.
47. The Tribunal has given considerable regard to the documentation before the Tribunal, and particular regard to the oral evidence present. Notwithstanding the modest financial circumstances of the parties, the applicant's decision to return to Australia to attend the hearing in person indicates a deep level of commitment between them.
48. Accordingly the Tribunal gives significant weight to the nature of the parties commitment to each other and finds that they demonstrate a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing.

49. **FINDINGS**

50. The Tribunal finds from all the evidence the parties are married to each other under a marriage which is valid for the purposes of the Act, and therefore at the time of application and time of decision the parties meet s.5F(2)(a).
51. The Tribunal is satisfied that at the time of application and the time of decision the applicant and the sponsoring partner have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.
52. Additionally, the Tribunal is satisfied that at the time of application and time of decision the applicant and the sponsoring partner live together. Accordingly, they meet the requirements of s.5F(2)(d) for a married relationship.

53. For these reasons, the Tribunal finds that at the time of application and time of decision the applicant and the sponsoring partner are in a married relationship within the meaning of s.5F(2) and therefore satisfy the definition of 'spouse' contained in s.5f.
54. The Tribunal is satisfied that at the time of application, and time of decision, the applicant was the spouse of the person who is an Australian citizen, that the applicant was sponsored by that person. The Tribunal finds that there is no evidence before it which indicates that the sponsor was prohibited from being a sponsoring partner under cl.820.211(2B).
55. Accordingly the applicant meets the requirements of cl.820.211(2)(a) and (c).
56. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the applicant meets cl.820.211(2) and cl.820.221.
57. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 58.

DECISION

59. The Tribunal remits the application for Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.
- 60.

Helen Kroger
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).